

# JUSTICE SCALIA'S UNFINISHED BUSINESS IN STATUTORY INTERPRETATION: WHERE TEXTUALISM'S FORMALISM GAVE UP

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## ABSTRACT

*Justice Scalia, in the end, was no interpretive formalist. He would not be pleased to hear this claim, but the fact is that formalism has not succeeded in statutory interpretation, and in fact, the textualism that Justice Scalia deserves so much credit for creating never really embraced formalism at all.*

*Textualism lacks all the conditions necessary for formalism. It does not have a defined set of predictable rules ordered to ensure objective application. Instead, we have more than one hundred interpretive presumptions—the presumptions favored by textualists—with no defined method of choosing among them. These doctrines of the field are not treated as precedent or even as law that a higher court or Congress is entitled to make. Instead, they occupy the unique status of being viewed as inherently personal to the individual judge, a status not shared by any other doctrines applied by Article III courts. The doctrines do not have a theorized jurisprudence that legitimates their source, ties them to a sovereign lawmaking power, or even indicates where the rules come from. Justice Scalia himself was never willing to admit that many canons—including ones he himself invented—are judicial creations, and hence, federal common law; to the contrary, he argued that treating them as common law might be unconstitutional.*

*Justice Scalia's incomparable contributions to statutory interpretation deserve great recognition. But even though his successful effort to create the modern field was ostensibly grounded in the rule of law, he either never really wanted formalism to succeed, or did not fully appreciate its implications. What would it take to make statutory interpretation truly formalist? Why did Justice Scalia's vision fall short? Answering these questions is essential to understanding his legacy, what textualism really is, and what he wanted it to be.*

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*"Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic! The rule of law is about form. . . . Long live formalism."*

—Antonin Scalia<sup>1</sup>

## INTRODUCTION

Are the rules of statutory interpretation predictable, or even fully listable? Are they treated as precedent, creating a stable law of methodology to bind future litigants and courts? Do they have a clearly defined jurisprudential source, such that those who wish to add or delete any rules know what legitimates them and who has the power to change them?

Justice Scalia, in the end, was no interpretive formalist. He would not be pleased to hear this claim, but we can prove it true by attempting to answer each of the above-posed questions, and realizing that the answer to each one is no. Statutory interpretation does not have a defined set of predictable rules. The doctrines of the field are not treated as law.<sup>2</sup> They do not have a theorized jurisprudence that legitimates their source, or even indicates what it might be.<sup>3</sup> Even as Justice Scalia, more than anyone else, emphasized the importance of formalism in statutory interpretation, he either never really wanted it to succeed, or did not fully appreciate its implications. What *would* it take to make statutory interpretation truly formalist? Why did Justice Scalia's vision fall short?

### A. *Justice Scalia Created a Field, But That Does Not Make It Formalist*

First things first. No one had a more important impact on the modern theory and practice of statutory interpretation than did Justice Scalia. The critique offered in this Essay is not intended to diminish the extraordinary contribution of this jurist who, more than any other, made legislation a field. Indeed, a big part of that contribution stems from Justice Scalia's stated belief in the applicability of legal formalism to the endeavor of interpreting statutes. He foresaw the rising, now completely dominant, number of statutory cases on the federal docket. He thought that serious legal doctrines could, and should, be applied to those cases. And he elevated, entrenched—and in many cases, even created—those legal doctrines themselves. All professors of legislation, myself included, largely owe Justice Scalia our careers.

The magnitude of Justice Scalia's contribution is captured beautifully in a 1992 article by the late Philip Frickey, another giant in the field and one

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1 ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25 (Amy Gutmann ed., 1997).

2 See generally Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011) (illustrating that federal courts treat both state and federal statutory interpretation methodology as much less law-like than they treat other interpretive principles, without justification).

3 *Id.*

who did not share Justice Scalia's interpretive philosophy. The article, titled *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, details how, as late as the early 1980s, even as lawyers were constantly dealing with statutes in litigation, they had little help from theorists, judges, or academics on how to frame cases, what principles to apply, and why.<sup>4</sup> Statutory interpretation was not a field viewed as intellectually vibrant; doctrines were not centralized or easily accessible in a single place; it was not taught in law schools.<sup>5</sup>

Justice Scalia, as Professor Frickey put it, brought the heat. Recognizing also the foundational roles of other esteemed law-professors-turned-jurists like Frank Easterbrook and Richard Posner, who brought the Chicago School's public choice theory to bear on the field and "provided much of the initial intellectual agenda for the revival of theory in statutory interpretation," Frickey wrote that Justice Scalia "contributed most of the fireworks. . . . [I]n Scalia, the so-called 'new textualism' found the right person—brilliant, bold, and nothing if not persistent—at the right place (the Supreme Court), at the right time."<sup>6</sup>

What Justice Scalia did was much more than merely diminish the credibility of legislative history and focus everyone on statutory text (and he certainly did both of those things). It is not the case that judges were not looking at text or not thinking about the rule of lenity and such in statutory cases before Justice Scalia, but it is the case that Justice Scalia recast all of those varied interpretive presumptions into the collected *doctrines* of the field—doctrines that every good lawyer must now brief and cite in litigation, or else commit malpractice.<sup>7</sup> These presumptions, the canons, are now taught in most American law schools. An ever-increasing number of law schools have even put them into the holy grail of legal education: the mandatory first-year curriculum.

Justice Scalia transformed these presumptions into the field's doctrines by hammering them home in case after case. He realized—after naively first introducing textualism in an essay that actually rejected the policy-based interpretive presumptions<sup>8</sup>—that even textualist judges need somewhere to turn when text provides no single answer. Justice Scalia rigorously insisted that the canons—both the language and the policy presumptions—were more legitimate rules of decision than legislative history, statutory purpose, or other materials. Several of the most important canons were actually cre-

4 Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 242 (1992) ("Practitioners of that era who sought guidance on statutory interpretation found little available.").

5 *Id.* ("[T]he general curricular mood was one of benign neglect.").

6 *Id.* at 254–55.

7 An early but influential treatise, J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* (Chicago, Callaghan & Co. 1891), also deserves much credit for cataloguing the canons as decision rules for the field. But the theoretical developments of the century between Sutherland and Scalia disrupted interest in the canons for many judges, and Scalia deserves much of the credit for their doctrinal revival.

8 See SCALIA, *supra* note 1, at 28 (labeling the substantive canons "dice-loading" rules).

ated on his watch, including the federalism canon,<sup>9</sup> the “no elephants in mouse holes”<sup>10</sup> rule, the major questions<sup>11</sup> rule, and the modern-day version of the extraterritoriality canon<sup>12</sup>—indeed the latter three were Scalia’s own creation. His last book, a treatise written with Professor Bryan Garner, catalogues and celebrates more than fifty canons.<sup>13</sup> They frame the debate in every modern case, and are used today by all judges—liberal, conservative, purposivist, textualist, pragmatic alike.<sup>14</sup> Thanks to Justice Scalia, we now see his liberal counterpart, Justice Elena Kagan—who graduated law school in 1986, during textualism’s early ascendancy—proclaiming that Justice Scalia “changed the way everybody does statutory interpretation”<sup>15</sup> and that “we are all textualists now.”<sup>16</sup>

This is a contribution that cannot be overstated. And it did establish a new way of practicing statutory interpretation. It did define a new battlefield and establish the possible array of weapons from among which to choose. That is *field creation* to be sure, and it certainly made statutory interpretation more predictable in a number of ways, in particular by establishing a common language for lawyers and judges to use. That is a remarkable achievement, but it does not make the field *formalist*.

And yet the core of Justice Scalia’s textualism, as he himself presented it, was supposed to be formalism. Justice Scalia’s aim was to bring rules, objectivity, and a disciplined approach to statutory cases. He famously proclaimed in his seminal piece that introduced textualism: “[O]f course it’s formalistic! The rule of law is *about* form. . . . Long live formalism.”<sup>17</sup> One of his most famous essays, *The Rule of Law as a Law of Rules*, emphasized that “[p]redictability, or as Llewellyn put it, ‘reckonability,’ is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.”<sup>18</sup>

9 See *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991).

10 *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).

11 See *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994).

12 See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

13 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

14 See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of 35 Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. (forthcoming 2017) (illustrating that all judges use the canons).

15 Justice Elena Kagan on *Supreme Court and Constitutional Law: McCormick Lecture at the University of Arizona Rogers College of Law* at 20:14, C-SPAN (Aug. 31, 2016), <http://www.c-span.org/video/?414445-1/justice-elena-kagan-supreme-court-constitutional-law&start=528>.

16 *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:28, HARV. L. TODAY (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation>. But see Gluck & Posner, *supra* note 14 (using the results of a judicial survey to argue that this may be somewhat overstated for lower court judges).

17 SCALIA, *supra* note 1, at 25; cf. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 667 (describing Justice Scalia’s textualism as grounded in formalism).

18 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (footnote omitted).

Many lawyers, judges, and academics have sided with this disciplined vision.<sup>19</sup> I count myself in that number, and have spent years trying to advance interpretive formalism's goals. I have argued the merits of a single controlling interpretive approach to statutory interpretation;<sup>20</sup> for statutory interpretation methodology to be given stare decisis effect;<sup>21</sup> for a theory of the canons that understands their source and their legal status as common law.<sup>22</sup> But I now believe that, although there is space for progress on this front, formalism will never be fully effectuated in this field. Moreover, it does not seem that formalism's fate would be any different even if Justice Scalia had lived another twenty years, because the Justice himself was never completely committed to it in the first place.

*B. Where We Go from Here—and Are There Any Real Textualists Left?*

The remainder of this Essay will illustrate how formalism has fallen short in statutory interpretation, and try to explain the continued resistance to it. At the end of the Essay, I briefly highlight a pair of recent cases—*Lockhart v. United States*,<sup>23</sup> the first case decided after Justice Scalia's death, and *King v. Burwell*,<sup>24</sup> the last major statutory interpretation opinion Justice Scalia authored (in dissent)—to illustrate both the weaknesses in textualism as Justice Scalia left it, as well as its remarkable achievements.

And what about the “big sleep” and the “big heat”? The field is certainly here to stay, but things could use some shaking up, just as Justice Scalia shook things up three decades ago. The intellectual battle that Justice Scalia began—the battle of textualism versus other methods of interpretation—was intensely vibrant, but that battle has taken us as far as it can go, and should now be put to rest. Thanks to the great intellectual efforts of textualists, purposivists, and pragmatists over the past three decades, a basic equilibrium

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19 See, e.g., Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 689 (1991) (“[R]ule-based decisionmaking, in the service of allocation of power values, is frequently a good thing, and . . . it is virtually impossible to imagine a legal system without it.”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 949 (2003) (emphasizing that both judges’ limited institutional capacities as well as the negative consequences of injecting uncertainty into areas of law counsel in favor of “generalist judges” adopting formalist techniques of statutory interpretation); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 145, 145–46 (2000) (“[T]he maxims and techniques of interpretive choice should push judges toward applying a small, cheap, relatively stable, and inflexible set of interpretive sources and doctrines in a rule-bound (formalist) way.”).

20 See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

21 *Id.*

22 Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013).

23 136 S. Ct. 958 (2016).

24 135 S. Ct. 2480 (2015).

has emerged.<sup>25</sup> All sides have significantly moderated and largely have converged on a middle-ground, text-focused position that, for most practitioners and judges (even if not for Justice Scalia himself), includes recourse to broader context, including, in disciplined fashion (again largely thanks to Justice Scalia), legislative materials.<sup>26</sup> This emerging equilibrium—which is another way to understand Justice Kagan’s comments—is an additional sign of Justice’s Scalia’s outsized influence.

At the same time, it has become very hard to find a serious textualist academic to argue for the pure Scalia position, or really any kind of strict textualism, now that Justice Scalia is gone. John Manning, the most widely respected textualist academic, has moderated significantly, and spent the last few years both looking toward the Legal Process School and also documenting the narrowing divide between the interpretive camps.<sup>27</sup> Professor Caleb Nelson, while still a formalist, concedes that “[a]lthough [he] consider[s] [him]self a textualist, [his] account will not necessarily match the self-perception of other textualists.”<sup>28</sup> Judge Easterbrook, the leading living textualist judge, himself recently wrote an essay charging textualism with an “absence of method,” an essay that largely agrees with my own argument that true formalism in statutory interpretation might be impossible.<sup>29</sup>

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25 See James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2745987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745987) (establishing that a moderate interpretive approach prevails across three circuits where there was evidence of consistent reliance on both textualist (dictionaries) and nontextualist (legislative history) sources of meaning); Gluck & Posner, *supra* note 14 (observing that all judges surveyed are willing to consult all of these materials); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30 (2006) (“[T]extualism has been so successful in altering the views of even nonadherents that it has become increasingly difficult for textualists to identify, let alone conquer, any territory that remains between textualism’s adherents and nonadherents.”); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119 (2009) (“The latest move in the interpretation wars, however, is to declare something of a truce. Textualism, intentionalism, and purposivism are either not all that different or at least not different in the way people usually think. That is the message in recent articles representing a new wave of scholarship that attempts to reach an accommodation among competing interpretive methods.”).

26 See Brudney & Baum, *supra* note 25; Gluck & Posner, *supra* note 14.

27 John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1315 (2010) (arguing that “second-generation textualism” presents a more moderate form of textualism and “does not depend on any factual assertion that legislative history is inherently unreliable or that the legislative process is incoherent” (emphasis omitted)); see also Siegel, *supra* note 25, at 128–30 (detailing how Manning has moderated his textualism). See generally John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1925 (2015) (“[T]he common ground between prominent Legal Process adherents . . . and leading textualists . . . exemplify how much institutional settlement frames the debate in a post-intentionalist environment. The two sides have more in common than many may realize.”).

28 Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351 (2005) (footnote omitted).

29 The essay appears in a *University of Chicago Law Review* symposium on methodology. See Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 83 U. CHI. L. REV.

Instead, for the field to continue to develop, the kinds of jurisprudential questions at the heart of this Essay are the questions that now demand answers. These are questions that Justice Scalia, frankly, did not seem interested in, or perhaps preferred to avoid. What exactly is the role of the federal judge in statutory interpretation? We must stop answering this question with the facile phrase “faithful agent of the legislature.” That is a phrase that means whatever one wants it to mean. Textualists and purposivists have debated for years about who is being a better “faithful agent”<sup>30</sup> and what interpretive rules best accomplish faithful agency, without ever disagreeing that the goal was to be a faithful agent in the first place.

But the faithful agent concept tells us nothing about how to resolve the most common and difficult kind of statutory interpretation problem, which is always a more specific problem of *role*. In any given situation and faced with choices—and there are always choices—judges must decide among interpretive methods that have different goals. Some interpretive tools assume Congress is omniscient, that statutes are drafted well, and aim to serve public notice considerations; other interpretive tools instead aim to figure out what Congress actually wanted, or would have wanted; still others bring in constitutional norms or other important policy considerations. An agent who is faithful might legitimately do all of these. I take on this problem directly in other work, but it is a very big question—the question that puts together the doctrines that Justice Scalia himself centralized with the theoretical question of the role of the Article III judge in a statutory case—and a question that has had remarkably little traction for a very long time.<sup>31</sup>

Here is one more challenge: think of any other field of law in which we do not know what the rules are, what legitimates them, where they come from, and who has the power to change them. Think of any other field of law in which federal judges insist that *no one*—not Congress, not the Court—can control the doctrines that apply. Any other field of law that occupies the majority of the federal docket yet whose fundamental mission remains so

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81 (2017) (arguing that methods of interpretation, including textualism, cannot be reduced to an “algorithm”). My own contribution to that symposium is likewise about the failure of formalism. Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 83 U. CHI. L. REV. 177 (2017).

30 Compare, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation*, 1776–1806, 101 COLUM. L. REV. 990, 993 (2001), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7–9 (2001) (each arguing his own preferred methodology better serves faithful agency than the other’s).

31 Jerry Mashaw was asking this question before Justice Scalia’s path-breaking essay was even published. See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686, 1700 (1988) (arguing that “[a]ny theory of statutory interpretation is at base a theory about constitutional law” and that “it is of the utmost importance to ground interpretation explicitly in constitutional values”); see also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 67 (1994) (“Any theory of meaning must be jurisprudential.”).

unclear. Justice Scalia woke the field from slumber, but did not fully theorize its path. Formalism could not possibly succeed without addressing these issues. And this is the project for the post-Scalia era, formalist or not.

### I. WHY STATUTORY INTERPRETATION IS NOT FORMALIST

Even as practiced by Justice Scalia himself, statutory interpretation has never been fully formalist. By applying consistent interpretive rules, formalism seeks to realize “rule of law values” such as transparency, predictability, and objectivity in the law.<sup>32</sup> We have not gotten there in statutory interpretation and we likely never will. Years of studying opinions, judicial writings, and interviewing judges themselves on this topic lead me to suggest that there is a dominant reason for this: federal judges do not desire the consequences that follow from a truly doctrinalized statutory interpretation regime. (Federal judges are intentionally singled out here, because many state courts have actually attempted to doctrinalize interpretive methodology.<sup>33</sup>)

Consider the consequences that judges find distasteful. A landscape of defined and binding rules for statutory interpretation would reduce decision-making flexibility. Understanding the field’s doctrines as ordinary legal rules also would open the door to superior judges or—worse, in the eyes of many judges—other branches of government controlling a judge’s interpretive approach. Such a rule-based regime would also demand some jurisprudential clarity. It would either require federal judges to admit they are creating federal common law when they create interpretive rules—an admission formalists abjure—or else it would force them to identify the canons as coming from some nonjudicial source, most likely Congress, which most judges do not want to do.<sup>34</sup> Even accounting for any judges who would adopt a formalized interpretive approach if the Supreme Court adopted one—a number my recent research with Judge Posner suggests is not as high as one might

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32 Scalia, *supra* note 18, at 1182; see William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y. 21, 22 (1998); Brian Z. Tamanaha, *The Mounting Evidence Against the “Formalist Age”*, 92 TEX. L. REV. 1667, 1667–68 (2014); see Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2 (2007); see also Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Realism*, 127 HARV. L. REV. 2464, 2493 (2014) (reviewing LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013)) (defending formalism and suggesting that the Epstein, Landes, and Posner study reveals that “judges overwhelmingly follow the law”). For classic critiques of formalism, see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489, 493 (1987) (arguing that formalism refuses to acknowledge the practical consequences of judicial decisions); and Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1506–07 (1985) (arguing that formalism artificially narrows an arbiter’s interpretive choices).

33 See Gluck, *supra* note 20 (studying state supreme courts that adopted a controlling interpretive regime, with stare decisis effect).

34 Gluck & Posner, *supra* note 14.



assume<sup>35</sup>—the Justices themselves may be the *most* averse to formalism's consequences. Our Supreme Court has never treated the rules of interpretation as precedential, subject to congressional control, or even admitted that it has created many of them.

#### A. *There Are Too Many Rules and We Do Not Agree on What They Are*

First, there are too many available rules for statutory interpretation to be formalist. There are certainly more than seventy interpretive presumptions and, really, there are probably closer to *one hundred*. It is worth noting here that Justice Scalia's interest in formalism was in part motivated by his distaste of "totality of the circumstances" inquiries, or multifactor balancing tests. His *Rule of Law as a Law of Rules* article specifically argued that such inquiries confer far too much discretion on judges, destroying predictability and uniformity and encouraging arbitrary decisionmaking.<sup>36</sup> His most important statutory interpretation article, *A Matter of Interpretation*, likewise called the many presumptions of interpretation "a lot of trouble," because "it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight."<sup>37</sup>

Nevertheless, statutory interpretation, as Scalia himself developed it, now more closely resembles a multifactor test than a formalist regime. A field with more than one hundred potentially applicable doctrines, with no order ranking those doctrines, and no clear rule about when individual doctrines are triggered and in what order they are triggered, effectuates an intense methodological pluralism.<sup>38</sup> It is not for nostalgic reasons that Karl Llewellyn remains, even post-Scalia, a common citation in the field for his infamous exposition that for every canon there is another applicable canon to counteract it.<sup>39</sup>

Let's start with the simple problem of identifying the doctrines. The number one hundred comes from the frequently cited catalogue of more than 150 canons put together by Professors Eskridge and Frickey in their 1993 *Harvard Law Review* Supreme Court Foreword,<sup>40</sup> and updated every year since then in the two Eskridge legislation casebooks.<sup>41</sup> The number sev-

35 *Id.*

36 Scalia, *supra* note 18, at 1182.

37 SCALIA, *supra* note 1, at 28.

38 Cf. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 547–50 (1992) (detailing how the various considerations in Justice Scalia's textualism, including conflicting canons and coherence, make it doubtful that textualists are pure formalists, and not exercising "practical reason").

39 See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

40 William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 app. (1994).

41 See WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION* (5th ed. 2014). The most recent list includes 161 canons, but some are overlapping, which is why I use the very conservative term one hundred. These lists have been

enty comes from Justice Scalia himself. His recent treatise with Bryan Garner identifies fifty-seven “approved” canons and thirteen canonical “falsities exposed.”<sup>42</sup>

But the Scalia catalogue unquestionably leaves many canons out, without explanation. Omitted entirely are the canons that relate to administrative deference—including *Chevron*, *Mead*, *Skidmore*, the major questions rule, *Curtiss-Wright* deference, and *Auer* deference. Even if one believes that *Chevron* and similar rules are not “canons” of construction (a perspective most legislation scholars take serious issue with),<sup>43</sup> one would be hard pressed to find anyone who would argue that the dozens of subject-matter-related presumptions that the Court routinely applies are not canons.<sup>44</sup> Among these canons are well-known presumptions including: the presumption in favor of arbitration,<sup>45</sup> the presumption against extraterritoriality,<sup>46</sup> the presumption that exemptions to the tax code are narrowly construed,<sup>47</sup> the presumption in favor of Native American rights,<sup>48</sup> the presumption that ambiguities in bankruptcy law favor the debtor,<sup>49</sup> the presumption against retroactivity,<sup>50</sup> the presumption in favor of the common law,<sup>51</sup> and dozens more.<sup>52</sup> These

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cited more in more than three hundred law review articles and at least seventeen cases, based on a Westlaw search conducted in March, 2017.

42 SCALIA & GARNER, *supra* note 13, at 341.

43 Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613–14 (2014); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

44 See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (examining substantive canons and questioning their origins).

45 See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

46 See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

47 See *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (holding, in a case concerning whether certain state and local public housing agency obligations were exempt from federal estate taxation, that the appellees’ argument “simply cannot overcome the understood meaning of § 5(e) and the presumption against implied tax exemptions”).

48 See, e.g., *Hagen v. Utah*, 510 U.S. 399, 411 (1994) (“Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.” (citations omitted) (citing *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (alteration in original) (internal quotation marks omitted)))).

49 See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (stating that the bankruptcy code should be construed in line with the “principal purpose of the Bankruptcy Code,” which is “to grant a ‘fresh start’ to the ‘honest but unfortunate debtor’” (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991) (internal quotation marks omitted))).

50 See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 287–88, 290–94 (1994) (Scalia, J., concurring).

51 See *Smith v. Wade*, 461 U.S. 30, 48–49 (1983).

52 See Eskridge & Frickey, *supra* note 40.

presumptions can be extremely powerful, and are often decisive in statutory cases.<sup>53</sup>

That Justice Scalia could author a treatise on the “approved canons” and not even *mention* these canons—presumptions his own Court used often and in many cases he himself applied and in several cases even created<sup>54</sup>—tells us something important about the (very nonformalist and unique) slack that we have been willing to cut to the concept of “doctrine” in this field.

I will not dwell on the fact that we do not have any ranking or ordering among the canons, because that point is well-established. When two textual canons compete head-to-head, for instance, there is no hierarchy to solve the impasse.<sup>55</sup> It remains unanswered whether a policy canon is still relevant if legislative history alone would clarify statutory language.<sup>56</sup> There is still no agreement about whether even very strong policy rules, like lenity, are opening presumptions to overcome or, rather, tiebreakers at the end after all sources are considered.<sup>57</sup>

The triggers for the rules themselves also are unclear. Does one need *ambiguity* to invoke a canon of interpretation? Over his last two terms on the bench, Justice Scalia wrote several opinions protesting the Court’s answers to that question.<sup>58</sup> As D.C. Circuit Judge Brett Kavanaugh points out in this Volume, even when we understand ambiguity to be a doctrinal trigger in statutory interpretation, we have no coherent, cabined, objective, or predictable definition of ambiguity in the first place.<sup>59</sup> Judge Kavanaugh has argued

53 For just a few recent examples, see *Bond v. United States*, 134 S. Ct. 2077, 2081 (2014) (deciding the case based on the federalism canon); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (deciding the case based on the presumption against extraterritoriality); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345–46 (2011) (deciding the case based on the presumption in favor of arbitrability); *Skilling v. United States*, 561 U.S. 358, 410 (2010) (deciding the case, in part, based on the rule of lenity: “Further dispelling doubt on this point is the familiar principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity’” (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000))).

54 See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (applying the presumption against extraterritoriality); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (creating the “major questions” rule).

55 For two recent cases illustrating battle of the canons with no resolving rule, see *Lockhart v. United States*, 136 S. Ct. 958 (2016); *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015).

56 See, e.g., *United States v. Hayes*, 555 U.S. 415, 429 (2009) (debating whether legislative history could be applied to clarify a statute before the rule of lenity would be applied).

57 See, e.g., *Bond*, 134 S. Ct. 2077 (arguing about what triggers the federalism canon); *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (arguing about what triggers the lenity canon); *id.* at 2281 (Scalia, J., dissenting) (same).

58 See *Bond*, 134 S. Ct. at 2095 (Scalia, J., concurring) (critiquing the way in which the Court starts with the federalism-related consequences and “reasons backwards”); *Abramski*, 134 S. Ct. at 2281 (Scalia, J., dissenting) (criticizing the majority’s “miserly approach” in declining to apply the rule of lenity); cf. *Zadvydas v. Davis*, 533 U.S. 678, 697 (2011) (debating how much ambiguity is needed before triggering the constitutional avoidance canon).

59 See Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907 (2017).

that this absence of definition makes the *Chevron* inquiry—under which ambiguity is the linchpin to administrative deference—decidedly nonformalist, and even discretion-enabling.<sup>60</sup> The argument extends to the many other ordinary, nonadministrative, canons with the same trigger.

Before going further, let me be clear. My aim here is not to pose a critique of this state of affairs. I spend many pages doing that elsewhere, including also outlining arguments that could lend support to a better version of our pluralistic approach to statutory interpretation. In this Essay, I am trying instead simply to illustrate that formalism not only has not succeeded in statutory interpretation, but that, in fact, we never really tried to achieve it. Making this point is essential to understanding Justice Scalia's legacy and understanding what textualism really is, indeed what *he* wanted it to be.

Understanding these shortcomings is essential because textualists, including Justice Scalia, lean heavily on textualism's purported formalism to argue textualism's normative superiority compared to other interpretive methodologies. They also cling to formalism as the justification for why it is acceptable to forgo an interpretive approach that is more tethered to the way Congress actually operates and drafts; the idea being that congressional reality is impossible to decipher and so we trade off the value of that democratic connection to Congress in exchange for the "rule of law" values and the benefits that a formalist regime brings.<sup>61</sup> Justice Scalia's textualism has brought benefits, but not those benefits. We need to recognize this fact to move past these kinds of arguments.

### B. *Judges Do Not Treat Interpretive Rules as Real Law*

The second type of evidence of the absence of complete formalism in statutory interpretation is the enduring, and mystifying, ambiguity of the legal status of methodology. The doctrines of the field—the presumptions and other tools that are applied as methodological decisionmaking rules—do not receive stare decisis effect. (This is a fact that has always been the case but, remarkably, had not been generally recognized until very recently.<sup>62</sup>) In other words, the use of the federalism canon, or the rule against superfluities, or a piece of legislative history in one case does not require it to be used in the next case, even where the same statute is being construed.<sup>63</sup> So, too, a vote of 8-to-1 by the Court about the utility or lack thereof of an interpretive tool does not bind the Court in any subsequent case.<sup>64</sup> Nor do the federal

60 See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135–44 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

61 See SCALIA, *supra* note 1, at 23–37; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533–34 (1983).

62 See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008); Gluck, *supra* note 20.

63 This is detailed at length in Gluck, *supra* note 20.

64 See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (voting 8-1 to support the utility of legislative history).

courts view interpretive methodology as a “rule of decision” subject to the *Erie* doctrine, and so they do not seek out state interpretive rules when they sit in diversity and otherwise apply all other types of state law.

No other field's decisionmaking doctrines share these characteristics. In previous work, I have illustrated how analogous interpretive rules, whether rules of contract interpretation, burden shifting, or other decisionmaking rules, do not have the same ambiguous legal status.<sup>65</sup> All of these other kinds of methodological rules are precedential and viewed as law subject to *Erie*. The absence of precedential effect alone might be fatal to a successful formalism, but even if it is not, some understanding of what the legal status of a field's rules *are* in the first place seems essential.

If there is any doubt as to whether all of these canons are actual decision rules, one need only scan the recent Supreme Court docket. Grammar canons, like the last antecedent rule, have decided major cases involving personal liberty and social security rights over the past decade.<sup>66</sup> Policy canons have decided cases ranging from the reach of chemical weapons conventions to the extraterritorial application of the securities laws.<sup>67</sup> To say that these canons do not function as decision rules is to say that the entire way in which judges express the bases for their decisions in statutory cases is fraudulent cover for something else. Of course, the “real” process of judicial decisionmaking—what makes judges actually decide cases the way they do—is difficult to know, but the question of how much doctrine drives actual decisionmaking permeates every area of law and that does not stop us from considering the decisionmaking rules of other fields as legal doctrines. Why have formalists given statutory interpretation doctrines a pass?

As further evidence that Justice Scalia did not fully think through these implications, his treatise with Professor Garner styles many of his approved interpretive rules as applicable to “all legal texts” including contracts, wills, and statutes.<sup>68</sup> But Justice Scalia, like everyone else, thought contract interpretation rules were precedential,<sup>69</sup> and subject to the *Erie* doctrine. He also thought they were common-law rules such that they could be decided by legislatures, whose views would overrule those of courts (just consider the Uniform Commercial Code if there is any doubt<sup>70</sup>). And yet, when asked this

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65 Gluck, *supra* note 2.

66 See *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016); *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

67 See *Bond v. United States*, 134 S. Ct. 2077 (2014); *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010).

68 SCALIA & GARNER, *supra* note 13, at 51.

69 See, e.g., *Tymshare, Inc., v. Covell*, 727 F.2d 1145, 1150 (D.C. Cir. 1984) (Judge Scalia favorably citing the Supreme Court of Appeals of Virginia, *Coal Operators Casualty Co. v. C.L. Smith & Son Coal Co.*, 66 S.E.2d 521, 525 (Va. 1951), for the proposition that “[t]he historical interpretation given to a contract by the parties is strong evidence of its meaning”).

70 See, e.g., *Gatoil (U.S.A.), Inc. v. Wash. Metro. Area Transit Auth.*, 801 F.2d 451, 456 (1986) (Judge Scalia writing for the court that “the present contract is governed by the U.C.C.”).

question about statutory interpretation, he protested the idea of methodological stare decisis for statutory interpretation doctrine and explicitly posited that legislative mandating of statutory interpretation rules might be unconstitutional.<sup>71</sup>

These are significant oversights. How to explain them? I think an important answer lies in the question of the stakes of a formalist approach, and also of the federal courts' interest in safeguarding judicial power. The stakes for judges of being bound to a particular interpretive methodology in statutory cases are awfully high. Statutory cases generally implicate many more different kinds of players—the public, Congress, agencies, states, etc.—than contract cases. The courts may see themselves as having different kinds of roles in different kinds of statutory cases. A precedential interpretive approach that would command for all cases the same kind of methodology, the same emphasis on a particular kind of tool over another, may not fit with a judicial conception of role that differs across cases.

More concretely, the stakes for *judicial power* also seem too high for many judges. A formalist regime would mean that the Supreme Court could (and should) dictate rules of interpretation to lower courts.<sup>72</sup> That would make these rules common law.<sup>73</sup> But common-law rules also can be legislated by *Congress*. Caselaw, empirical work, and judicial writing all confirm that most judges (like Justice Scalia) have a visceral, highly negative reaction to such a proposition about congressional power (and even Supreme Court power) over statutory interpretation.<sup>74</sup>

Some of this aversion to a conception of interpretive methodology that allows it to be controlled by anyone else comes from a distrust of, or lack of respect for, coordinate branches, or even the Court.<sup>75</sup> But, more fundamentally, there seems to be a constitutional-law-level intuition at play here that choice of interpretive method is so inherent in each *individual* judge's power to adjudicate that it cannot be controlled by anything, or anyone, else. This

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71 SCALIA & GARNER, *supra* note 13, at 43–44, 243–45.

72 Gluck & Posner, *supra* note 14.

73 Some canons might be understood not as common law but as a special kind of law that enforces constitutional norms or implements the Constitution—a kind of judge-made law that has been given a variety of labels in the constitutional-law context, including “constitutional common law.” Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975); see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 167 (2004). Not everyone who views the doctrines as judge-made views them as a type of common law. See, e.g., Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2095 (2002) (preferring the label “constitutional starting-point rules”). But that describes a very few—such as lenity, avoidance, or federalism. The vast majority of other canons do not have a plausible constitutional source.

74 Gluck & Posner, *supra* note 14. Many states have attempted to legislate interpretive rules, only to meet resistance from state and federal courts alike. Gluck, *supra* note 20 (studying this interaction); Gluck, *supra* note 2 (collecting cases); see also SCALIA & GARNER, *supra* note 13, at 43–44, 243–45 (claiming this would be unconstitutional).

75 See Gluck & Posner, *supra* note 14 (illustrating federal appellate judges' lack of confidence in the Court's judgment on these matters).

view of statutory interpretation doctrine as inherently *personal* is not compatible with formalism. It also is a unique perspective on the Article III power that conceives that power as individually held, rather than held as a unit by Article III judges all acting under the supervisory power of the Court and, sometimes, Congress.

This is not something we see in any other power derived from Article III. Even constitutional interpretation is regulated by doctrines. Lower courts do not dispute the Court's power to announce decisionmaking regimes, such as the tiers of scrutiny or the various First Amendment tests to bind the inferior federal courts. To be clear, the relevant comparison here is not to originalism or a different, overarching constitutional theory. My point is not that formalism or the Constitution requires that textualism, purposivism, or any other overarching theory should receive *stare decisis* effect or a firm legal status. My point is that the *individual* decisionmaking rules within all of these regimes—and indeed shared by all of these regimes—have a concrete legal status across all other areas of law, but not in statutory interpretation. Justice Scalia was never willing to engage with this puzzle.

### C. Formalism Requires a Sovereign Source of Law

Where do canons and presumptions come from? No one needs to be reminded that most federal judges generally do not believe they have free-floating federal-lawmaking power,<sup>76</sup> and interpretive formalists certainly also ascribe to that position.<sup>77</sup> Justice Scalia himself took a very stingy view of the federal courts' federal-lawmaking power.<sup>78</sup> He, like most formalists, believed

76 See Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 264 (1992) ("Martin Redish mounts the most extreme attack, arguing that the whole notion of lawmaking by federal judges is contrary to the principles on which the nation was founded." (citing MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 29–46 (1991))); see also *id.* ("Tom Merrill, George Brown, and Don Doernberg take less extreme positions, but still treat federal common law as something questionable . . ."). For articles challenging the legitimacy of some canons on this basis, see generally Barrett, *supra* note 44, at 116; and John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2006 (2009).

77 See SCALIA, *supra* note 1, at 17–18; John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1662–63 (2001); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 3 (1985); Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1358, 1364–65 (2015).

78 But see *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (creating, via a majority opinion by Justice Scalia, a federal-common-law defense for federal contractors); James B. Staab, *Conservative Activism on the Rehnquist Court: Federal Preemption Is No Longer a Liberal Issue*, 9 ROGER WILLIAMS U. L. REV. 129, 181–82 (2003) ("Justice Scalia's willingness to invoke federal common law in [*Boyle*] also contradicts his sharp criticism of 'judicial legislating' in other areas of the law."); Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1483 n.80 (2014) ("However, Justice Scalia, a chief antagonist of federal common-law claims, has

that law must be linked to a sovereign source. That is a key holding of the famous *Erie* case.<sup>79</sup>

It seems incontrovertible that many of the canons come from judges. My own research, as well as the work of Amy Coney Barrett and others, establishes that virtually every policy or constitutionally inspired canon was created in the federal courts.<sup>80</sup> The idea that judges should look to dictionaries, or legislative history, or agency deference as a tool of interpretation was also originated by federal judges. The origins of the grammar/Latin canons are more complex. Some of these canons, including *ejusdem generis* and *inclusio unius*, appear to have been used since late sixteenth- or early seventeenth-century England,<sup>81</sup> and they make their first appearances in federal court

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no hesitation in ignoring his dislike of federal common law when it comes to fashioning new federal common-law defenses." (emphasis omitted)).

79 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 79 (1938) ("There is no federal general common law. . . . [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it.").

80 See Barrett, *supra* note 44, at 125–55 (tracing the history of six substantive canons: lenity, *Charming Betsy*, avoidance, presumption against retroactivity, sovereign immunity clear statement rules, and the Indian canon); *id.* at 127 (noting that while many canons of interpretation "had their roots in English common law" American courts were willing to "adopt[ ] new ones" as well).

81 On the origins of *ejusdem generis*, see *The Archbishop of Canterbury's Case* (1596) 76 Eng. Rep. 519 (KB) (Eng.); see also *Button v. State Corp. Comm'n of Va.*, 54 S.E. 769, 771 (Va. 1906) ("The principle [of *ejusdem generis*] is happily illustrated by the Archbishop of Canterbury's Case."); SCALIA & GARNER, *supra* note 13, at 200 ("Courts have applied the rule [of *ejusdem generis*], which in English law dates back to 1596, to all sorts of syntactic constructions that have particularized lists followed by a broad, generic phrase."); I GRAHAM WILLMORE ET AL., *REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF QUEEN'S BENCH* 7 (London, H. Butterworth, R. Pheney & G.F. Cooper 1839) ("When general words follow particular ones, they must be held to apply to matters *ejusdem generis*. This rule was laid down in the Archbishop of Canterbury's case . . ."); David Hunter Miller, *The Occupation of the Ruhr*, 34 YALE L.J. 46, 49 (1924) ("In English law, the rule goes back at least to Coke [author of the opinion in *Canterbury's Case*] . . ."). *Expressio unius* has likewise been traced to Edward Coke. See, e.g., EDWARD COKE, *FASCICULUS FLORUM* (Thomas Ashe ed., London, G. Eld 1618); MICHAEL HAWKE, *THE GROUNDS OF THE LAWES OF ENGLAND* (London, H. Clifford & T. Dring 1657).

On the origins of *noscitur a sociis*, see *State v. Murzda*, 183 A. 305, 308 (N.J. 1936) ("Noscitur a sociis. This maxim [is] grounded in grammar and firmly established as a rule of exposition since its adoption by Lord Hale . . ."); see also 3 *AMERICAN RAILROAD AND CORPORATION REPORTS* 138 (John Lewis ed., Chicago, E.B. Myers & Co. 1891) ("Lord Hale's maxim of *noscitur a sociis* is . . . the rule . . . that the meaning of a word may be ascertained by reference to the meaning of words associated with it."); WILLIAM HAYES, *AN INQUIRY INTO THE EFFECT OF LIMITATIONS TO HEIRS OF THE BODY IN DEVICES* 329 (London, J. Butterworth & Son 1824) ("[I]n determining *Evans v. Astley*, the Court considered the rule adopted by Lord Hale, *noscitur a sociis* . . ."); JAMES RAM, *A PRACTICAL TREATISE OF ASSETS, DEBTS AND ENCUMBRANCES* 52–53 (Kessinger Publ'g 2010) (1835) (same); 4 *THE REVISED REPORTS: BEING A REPUBLICATION OF SUCH CASES IN THE ENGLISH COURTS OF COMMON LAW AND EQUITY FROM THE YEAR 1785*, at 611–12 (Frederick Pollock et al. eds., London, Sweet & Maxwell, Ltd. 1892) ("In the construction of wills we cannot do better than adopt the rule mentioned by Lord Hale, *noscitur à sociis*.").



opinions in the early nineteenth century.<sup>82</sup>

But even if Latin canons preexisted our federal courts, it was *our* federal courts that adopted them and put them into service in everyday statutory cases. That act of adoption is itself an act of federal common lawmaking, just as it is when federal courts adopt state statutes of limitations or other jurisdictions' rules as rules of decision in the federal courts.<sup>83</sup> Just because rules have an old pedigree does not make them "general law" (which the Supreme Court regardless held in *Erie*<sup>84</sup> was no longer a legitimate source of law).<sup>85</sup> Once they are adopted by the federal courts for use in federal cases, they are federal common law, requiring a federal sovereign source. The source of such canons—even though Justice Scalia would not acknowledge it—is *judges*.

The formalist insistence that every legal doctrine has an ascertainable, legitimate source has been most visible recently in the international law context, in which scholars have debated whether certain international law norms are illegitimate if they do not have a source in U.S. law.<sup>86</sup> Judge Kavanaugh considered this debate in a high-profile 2010 case, concurring to note the potential conflict between *Erie* and the use of such external policy norms in statutory interpretation:

[I]n the post-*Erie* era, the canon does not permit courts to alter their interpretation of federal statutes based on international-law norms that have not

82 For an early invocation of *ejusdem generis*, see for example *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 329 (1827) ("The principle, that the association of one clause with another of like kind, may aid in its construction, is deemed sound . . ."); and *Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. (4 Wheat.) 1, 7 (1819). *Noscitur a sociis* is of similar date, see, e.g., *Lambert's Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 134 (1805) ("It is true, that this word, when coupled with things that are personal only, shall be restrained to the personality. *Noscitur a sociis*."). *Expressio unius est alterius exclusio* finds roots in the early nineteenth century as well. See, e.g., *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 356 n.\* (1806); *Manella, Pujals & Co. v. Barry*, 7 U.S. (3 Cranch) 415, 430 (1806).

83 See HART & WESCHLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 635–77 (Richard H. Fallon, Jr. et al. eds., 7th ed. 2015).

84 *Erie*, 304 U.S. at 78 ("There is no federal general common law.")

85 But see Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 521–25 (2006) (arguing at least interpretive rules should be understood as persisting general law, *Erie* notwithstanding). In my view, general law was eliminated as a legitimate source of law in *Erie Railroad Co.*, and regardless, the canons are not general law. Insofar as they have been appropriated by the federal courts, they are now federal common law, even if they once were general law. A state supreme court or legislature could, and many have, define rules of interpretation for state statutes. No one would call those rules general law; they are state law.

86 See, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 483 (1998); see also *id.* ("[I]t is arguable that, '[w]hen actual congressional intent is ambiguous or absent,' applying the *Charming Betsy* canon 'is the same as creating a rule that the government regulatory scheme cannot violate international law.'" (second alteration in original) (quoting Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 675 (1986))).

been incorporated into domestic U.S. law. . . . *Erie* means that, in our constitutional system of separated powers, federal courts may not enforce law that lacks a domestic sovereign source.<sup>87</sup>

The opinion goes on to argue that it is Congress, and not the courts, that is responsible for incorporating such external norms into domestic law—in other words, in Kavanaugh’s view, that it is Congress, and not the courts, that properly serves as the “domestic sovereign source” of legal principles, including extra-legislative policies used to interpret ambiguous federal statutes.<sup>88</sup>

Justice Scalia was never willing to engage this question when it comes to statutory interpretation doctrines, and no other federal judges have publicly engaged with it either, outside of the international law norm context. And, in fact, outside of that context, most judges do *not* think that Congress should be incorporating statutory interpretation norms into domestic, legislated law. Most judges do not think, as I have discussed, that legislatures can control interpretive methodology. (This seems to be a widely held judicial view. Even in more formalist states in which the highest state court has articulated a controlling interpretive approach that lower courts are willing to follow, most judges still resist the idea that legislatures could legislate interpretive rules.<sup>89</sup>)

I happen to believe that federal judges have nothing to be ashamed of in admitting that the source of the canons is their own federal-common-lawmaking power. The *Erie* case was about a different problem altogether and has been seriously over-read in modern times. *Erie* was about the ability of federal courts to create rules of decision for *states*, including in areas in which Congress’s own lawmaking power would not allow for federal legislation on those same questions. The question we are dealing with here is entirely different. It is an exclusively *federal question*—the question of the decisionmaking rules that apply to federal legislation. This question was not on anyone’s mind when *Erie* was decided. *Erie* came at the dawn of the New Deal, before the explosion of federal statutory law—and with it, federal statutory interpretation cases. No one thinks the various fifty state rules of interpretation should be applied by federal courts in interpreting federal statutes. The sovereign source of the rules that interpret federal laws is Congress, or the delegated power to the Article III courts to resolve cases and controversies involving federal statutes.<sup>90</sup>

Justice Scalia once proclaimed that the question of whether Congress had the power to legislate interpretive rules was “academic.”<sup>91</sup> In fact, Con-

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87 *Al-Bihani v. Obama*, 619 F.3d. 1, 10, 17–18 (2010) (Kavanaugh, J., concurring in denial of reh’g en banc).

88 *Id.* at 18, 33.

89 Gluck, *supra* note 20, at 1182–94 (detailing the reactions of, *inter alia*, Connecticut, Texas, and Oregon judiciaries to legislated interpretive rules).

90 I have detailed this argument in several places, including Gluck, *supra* note 22; and Gluck, *supra* note 2.

91 Gluck, *supra* note 22, at 804. (“Justice Scalia, for instance, recently called the separation of powers debate ‘academic’ and claimed that, other than a few rules of construction

gress has legislated *thousands* of interpretive rules across the U.S. Code, from definitions of statutory terms to presumptions of interpretation, like ERISA's famous preemption savings clause. The bigger question is whether, if Congress can do this—if Congress can create as law these presumptions of federal statutory interpretation—why not the courts? Why can't the courts admit what they are doing? But either way—and this is really my point for purposes of this Essay—a developed, formalist theory of statutory interpretation would have grappled with these questions one way or the other.

I think this may be one explanation for the conspicuous omission of the policy and subject-matter canons from the Scalia/Garner treatise. As noted, Justice Scalia's most important writing on statutory interpretation, his 1989 Tanner Lecture, expressed discomfort with the policy canons. He called them "thumb on the scales" and "dice-loading" rules. He was willing to use them nonetheless<sup>92</sup>—likely because he had to, because text cannot answer every question. But he never appeared to develop a satisfactory theory of why, and that may explain why he did not address their validity in the treatise.

#### D. *Activism in the Rules*

Formalism requires rules that are defined and predictably applied, but it does not necessarily require the rules to be normatively neutral (if such a concept is even possible).<sup>93</sup> A rule that says, "Whenever the outcome is in doubt, the government loses," would be formalist, even if embracing an obvious value preference.

I make this point here because Justice Scalia often insisted, as *part* of his formalist defense of textualism, that textualism's rules are value-neutral.<sup>94</sup>

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requiring statutes to be 'liberally construed' and state efforts to abolish the rule of lenity, such enactments directing judicial interpretation do not exist in the real world." (quoting SCALIA & GARNER, *supra* note 13, at 245)).

92 See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (arguing that the Federal Arbitration Act reflects a "liberal federal policy favoring arbitration" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *United States v. Santos*, 553 U.S. 507, 514 (2008) (applying lenity); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 356 (1998) (Scalia, J., concurring) (applying avoidance); see also Barrett, *supra* note 44, at 121–23 (listing several examples of textualists, including Justice Scalia, accepting substantive canons).

93 Formalist theorists seem to disagree on this point. Cf. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999) ("[F]ormalism is an attempt to make the law both *autonomous*, in the particular sense that it does not depend on moral or political values of particular judges, and also *deductive*, in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases.").

94 See SCALIA & GARNER, *supra* note 13, at 17 ("If pure textualism were a technique for achieving ideological ends, your authors would be counted extraordinarily inept at it."); see also SCALIA, *supra* note 1, at 3, 17–18, 28 (defending textualists' attempts at arriving at a "uniform objective answer" in matters of statutory interpretation and asserting that "[t]he practical threat is that, under the guise or even the self-delusion of pursuing unexpressed

This is not accurate. Putting aside the policy canons, which are unquestionably normative in that they favor values like federalism, Native American rights, bankrupt debtors, arbitrators, and so on, textualism's linguistic and grammar canons are not neutral, either.

Justice Scalia pilloried purposivism and pragmatism for being "activist," for doing things to statutes that Congress did not, and for helping Congress when Congress's own drafting fell short.<sup>95</sup> But textualism's text-based canons assume and impose a perfection and omniscience on Congress—consistency, lack of redundancy, fully inclusive lists, and so on—that empirical work shows Congress cannot come close to achieving and in many cases affirmatively does not even wish to achieve.<sup>96</sup> Making statutes consistent where Congress did not, or removing redundancies where Congress inserted them on purpose, is just as much judges shaping statutes outside of the legislative process as is imposing a pragmatist view.

There are good reasons why courts might legitimately take this approach—reasons traditionally favored by the legal system, including the value of public notice—but that does not make it a passive endeavor. Textualism muscles the U.S. Code in ways Congress did not, just as Justice Breyer shapes the Code with recourse to purpose, or Judge Posner shapes the code to advance pragmatic values. One can say, "Judges shall always consult purpose first," and that might be just as formalist, and have the same level of neutrality, as saying "Judges shall always read text to be consistent." The values are just different.

## II. KING AND LOCKHART

I conclude here by very briefly mentioning two of the last statutory interpretation cases with Justice Scalia's imprint on them, by way of offering some concrete examples of both his remarkable legacy and also the gaps in his formalist vision.<sup>97</sup> The cases are *King v. Burwell*,<sup>98</sup> the 2015 statutory inter-

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legislative intents, common-law judges will in fact pursue their own objectives and desires").

95 See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) ("[C]ontext . . . is a tool for understanding the terms of the law, not an excuse for rewriting them."); SCALIA, *supra* note 1, at 17–18 ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."); SCALIA & GARNER, *supra* note 13, at 16–17 ("If any interpretive method deserves to be labeled an ideological 'device' it is not textualism but competing methodologies such as purposivism and consequentialism, by which the words and implications of the text are replaced with abstractly conceived 'purposes' or interpreter-desired 'consequences.'").

96 See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (a survey of congressional drafters showing their rejection of many textualist assumptions).

97 Space constraints require only a cursory review. I offer detailed discussion of these cases in Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the*

pretation challenge to the Affordable Care Act (ACA), President Obama's health reform statute, and *United States v. Lockhart*,<sup>99</sup> a case about penalty enhancements in the Child Criminal Pornography Act.

*King* was set up to be a text-and-canon battle of epic proportions: How would the Court's textualism handle four poorly drafted words in the two-thousand-page ACA that could not possibly carry their literal meaning, without destroying the entire scheme? As detailed below, *King* turned out to be something very different, a case that, while nodding significantly to textualism, took a macro, not micro, approach to text, as well as a realistic view of Congress, and eschewed canons completely. Justice Scalia was in dissent.

After *King*, the future of Justice Scalia's textualism seemed unclear. Was *King* a special case for a special statute, or did it signal that a portion of the Court was interested in moving away, at least to some extent, from textualism's vision? *Lockhart* dispelled those questions. As detailed below, that case, with dueling opinions written by Justices Sotomayor and Kagan—certainly not the Court's staunchest textualists—decided a man's criminal sentence based on two grammatical canons that it is virtually assured Congress never considered when drafting. It was "Scalia & Garner 101," with the citations to that treatise to provide it. Justice Scalia died shortly before the case was decided, but he was active in oral argument and his position is clearly expressed in Justice Kagan's dissent.

#### A. *King*: Textualism's Biggest Test

The specific question in *King* concerned the phrase "Exchange established by the State," in a provision about the calculation of healthcare subsidies essential to the ACA's ability to function.<sup>100</sup> Read literally, that provision appeared to award those subsidies only to states that operated their own health insurance exchanges and not to the other half of the states, which had opted, as the ACA allowed, for the federal government to operate the exchanges for them. A literal reading of the text, virtually everyone agreed, would destroy the insurance markets in the federal-exchange states and take the ACA down.<sup>101</sup>

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*Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 63 (2015) (discussing *King*); and Gluck, *supra* note 29 (discussing *Lockhart*).

98 *King*, 135 S. Ct. 2480.

99 *Lockhart v. United States*, 136 S. Ct. 958 (2016).

100 26 U.S.C. § 36B(b)(2)(A) (2012).

101 See, e.g., Brief of the American Hospital Ass'n et al. as Amici Curiae in Support of Respondents, *King*, 135 S. Ct. 2480 (No. 14-114); Brief Amici Curiae for Bipartisan Economic Scholars in Support of Respondents at 2-5, 16-27, *King*, 135 S. Ct. 2480 (No. 14-114); LINDA J. BLUMBERG ET AL., URBAN INST., THE IMPLICATIONS OF A SUPREME COURT FINDING FOR THE PLAINTIFF IN KING VS. BURWELL: 8.2 MILLION MORE UNINSURED AND 35% HIGHER PREMIUMS (2015), <http://www.urban.org/sites/default/files/publication/49246/2000062-The-Implications-King-vs-Burwell.pdf>; *The Affordable Care Act's Health Insurance Marketplaces by Type*, THE COMMONWEALTH FUND, <http://www.commonwealthfund.org/interactives-and-data/maps-and-data/state-exchange-map> (last visited Mar. 26, 2017).

The briefing was a testament to Justice Scalia's impact and that is the main reason I highlight it here. This was a case about a potential drafting error—four words that could not possibly mean what they said, in light of what the ACA was trying to do. But none of the briefing was willing to go to purpose, or legislative history (of which there was very little), or even to mention the realistic proposition that there may have been a drafting mistake. *All* of the briefing was textualist. It was a battle of how to construe the existing statutory language and structure, in light of the text and policy canons, including policy canons grounded in federalism principles and the tax code.

At the same time, however, *King* was a dangerous case for textualism. It was a self-conscious attempt by the ACA's opponents to *use* the Court's preference for this text-and-canon approach, with its associated reluctance to delve into legislative complexity, to make the Court a pawn in a game of rough politics. The case's architects sought, as they put it, to "exploit[ ]" the four isolated words to pull the statute apart by concentrating on "bits and pieces of the law,"<sup>102</sup> the instantiation of what Professor Thomas Merrill wrote in 1994 was the then-newly ascendant theory of textualism's greatest risk: converting the Court's role to answering a clever puzzle, masking in neutral-sounding interpretive presumptions a deeply unforgiving view of Congress.<sup>103</sup>

Returning to Philip Frickey's article about textualism, mentioned at the outset of this Essay, Frickey also highlighted one case as the tipping point that opened the door to textualism.<sup>104</sup> That case was *United Steelworkers of America v. Weber*,<sup>105</sup> in which the Court relied on a heavily purpose-and-legislative-history-driven approach to interpret Title VII of the Civil Rights Act to permit affirmative action. For the many lawyers and judges who felt the Court went too far in *Weber*, textualism offered a course correction. When *King* was briefed, it seemed that *King* could be *textualism's Weber*, a case that showed the dangers of textualism without moderation, one that could embarrass its proponents and the Court, and possibly incite a change of methodology going forward.

The Court did not take the bait. Instead what Chief Justice Roberts, writing for the majority, gave us was an opinion that was "textualist" in the sense of eschewing purpose and focusing only on the words of the statute. But it was also different from Justice Scalia's textualism, in its surprising lack of reliance on canons and also its insistence that the words must be read in the broader statutory context, not microscopically. It was a victory for Justice

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102 Am. Enter. Inst., *Who's in Charge? More Legal Challenges to the Patient Protection and Affordable Care Act* at 1:33:00, YouTube (Mar. 11, 2014), <http://www.youtube.com/watch?v=C7nRpJURvE4> (remarks of Michael Greve at a December 6, 2010, panel to discuss legal challenges to the ACA).

103 Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994).

104 Frickey, *supra* note 4, at 245–57.

105 443 U.S. 193 (1979).

Scalia because the Court was conspicuous in its determination not to even whisper about “purpose” or legislative history. Chief Justice Roberts instead chose the concept of a “legislative plan”—the written words, as a whole, on the page—as the relevant context in which the four words had to be interpreted. When he wanted to produce proof of Congress’s aims, he cited the enacted text—the statutory findings—rather than legislative history. It was a rational, forgiving reading of the statute, but using textualist tools.

But *King* also revealed textualism’s weaknesses in several important ways, not least of which was the fact that the briefing was a Llewellynian nightmare of warring canons that proves the central thesis of this Essay: that textualism provides no more of a predictable or formalist way of deciding cases than does relying on other legislative materials. The fact that the Court did not use canons seems related to this weakness. To have decided such a big question by picking one of many available and conflicting canons might have appeared a cop-out, even illegitimate.

The case also underscored like no other the dangers of textualism’s vastly oversimplified vision of Congress. The Chief Justice’s willingness to push aside textualism’s assumption that Congress drafts perfectly and omnisciently was a critical move in the decision.<sup>106</sup>

#### B. Lockhart: *Textualism’s “Absence of Method”*

*Lockhart*, on the other hand, is Justice Scalia, all the way through. The case concerned whether penalty enhancements in the Child Pornography Prevention Act of 1995 were applicable to those with a prior state conviction “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward” applied to all prior abuse convictions, or whether the limitation “involving a minor or ward” applied only to the last item on the list.<sup>107</sup>

The primary argument before the Court—in a case that involved a person’s liberty—involved a war between two arcane textual grammar canons that it is virtually certain no elected member of Congress or high-level policy staff considered when voting or drafting. The majority, per Justice Sotomayor, applied what she called a “timeworn textual canon,”<sup>108</sup> the so-called “last antecedent rule,” which presumes that a modifier at the end of a series only applies to the last antecedent.<sup>109</sup> The dissent, per Justice Kagan, would have had the case turn on the “series-qualifier canon,” a rarely applied presumption that “a modifier at the end of the list ‘normally applies to the

106 See *King*, 135 S. Ct. at 2492 (“The Affordable Care Act contains more than a few examples of inartful drafting. . . . Anyway, we ‘must do our best . . .’” (quoting *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 134 S. Ct. 2427, 2441 (2014))).

107 18 U.S.C. § 2252(b)(2) (2012).

108 *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016).

109 *Id.*; accord *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *Fed. Trade Comm’n v. Mandel Bros., Inc.*, 359 U.S. 385, 389 & n.4 (1959).

entire series.’”<sup>110</sup> Each Justice cited Justice Scalia’s treatise’s “approved” canons to justify her respective choice.<sup>111</sup>

As a matter of legitimacy, even for textualist-formalists, why would those two grammar canons be the rules that framed the debate in the case? Neither canon is normatively superior to the other, nor is there any way to predict which one would have applied—there exists no hierarchy or decision rule to choose between them (something Justice Scalia himself acknowledged at oral argument, and so suggested a third canon—lenity—as tie breaker). Judge Easterbrook likewise identifies *Lockhart* as an example of how textualism suffers from an “absence of method.” As the first case decided after Justice Scalia’s death, *Lockhart* evinces his enormous influence, across the entire federal bench. Indeed, then-Judge Gorsuch praised *Lockhart* and stated that “it would be hard to imagine a more fitting tribute” to Justice Scalia than these “dueling textualist opinions.”<sup>112</sup> The fight in that case, as noted, was not between two of the Court’s conservatives, but rather, between Justices Sotomayor and Kagan. Textualism, as Scalia practiced it, endures. The question is what comes next.

#### CONCLUSION

Justice Scalia created the field of modern statutory interpretation, but he, like the textualism he entrenched across the U.S. courts, was never really formalist. There are too many rules; the rules lack predictable means of application; they lack a clear legal status or even a defined source; and they are as activist as pragmatism and purposivism, albeit in a different way.

Many of these gaps, at least for Justice Scalia, seem left by design, or at least in an effort to avoid the difficult questions of the lawmaking power of the federal courts in the modern statutory era. But make no mistake: Justice Scalia deserves the credit for ushering in the law of that era, indeed for insisting there *should* be a law for our statutory age. For that, he will always be a giant in the field. But it is now up to the rest of us to clarify exactly what this field is about, and what jurisprudential theory and source of law legitimates it. Formalists would expect no less.

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110 *Lockhart*, 136 S. Ct. at 970 (Kagan, J., dissenting) (quoting SCALIA & GARNER, *supra* note 13, at 147).

111 Compare *id.* at 962–63 (majority opinion) (citing SCALIA & GARNER, *supra* note 13, at 144, in support of the rule of the last antecedent), with *id.* at 970 (Kagan, J., dissenting) (citing SCALIA & GARNER, *supra* note 13, at 147, to invoke the series-qualifier canon).

112 Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 907–08 (2016).